Supreme Court, U.S.
FILED
06-461 AUG 29 2006
No: OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATE OF AMERICA,

Respondent,

vs.

JOSEPH O. SALADINO,

Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX
TO THE
PETITION FOR A WRIT OF CERTIORARI

JOSEPH O. SALADINO
Pro se Litigant
9637 W. LITTLEWOOD DR.
BOISE, IDAHO 83709
208-562-1089

August 28, 2006

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APPENDIX A

Orders from the Ninth Circuit Court of Appeals

1. Order of March 29, 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 29 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee v. JOSEPH O. SALADINO, individually doing business as Freedom and Privacy Committee, Defendant-Appellant	Case No. 05-55226 D.C. No. CV-04-02100-FMC MEMORANDUM

Appeal from the United States District Court
For the Central District of California
Florence Marie Cooper, District Judge, Presiding

Submitted March 8, 2006

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges

Joseph O. Saladino, individually and dba Freedom & Privacy Committee, appeals pro se from the district court's summary judgment in favor of the United States in its action brought under 26 U.S.C. §§ 7402 and 7408 to

enjoin Saladino and his organization from promoting, selling, and otherwise furthering, certain corporation sole and claim-of-right tax avoidance plans. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion the grant of an injunction, *United States v. Estate Pres. Servs.*, 202 F3d 1093, 1098 (9th Cir. 2000). We affirm.

Summary judgment was proper because Saladino failed to raise a genuine issue of material fact as to whether the tax avoidance plans he sold on his website constituted conduct subject to penalty under 26 U.S.C. §§ 6700 or 6700. Saladino's affidavit established that he was solely responsible for the website that sold the plans, and the Court of Federal Claims has ruled these plans and arguments in support of them meritless. *See Sumter v. United States*, 61 Fed. Cl. 517, 523 (2004); *Saladino v. United States*, 63 Fed. Cl. 754, 757-58 (2005) (sanctioning Saladino for advancing the same meritless arguments he presents here). This court has rejected similar arguments as well. See, e.g., *Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1985) (per curiam) (rejecting as frivolous taxpayer's contention that wages are not income); *Church of Scientology v. Comm'r*, 823 F.2d 1310, 1316-17 (9th Cir. 1987) (noting that churches are eligible for tax exempt status only if no part of their net earnings inures to the benefit of private individuals).

Accordingly, the district did not abuse its discretion in granting injunctive relief to the United States. *See United States v. Estate Pres. Servs.*, 202 F.3d at 1089 (concluding that an injunction should be granted if statutory requirements are met).

AFFIRMED.

No Signature

2. Order of May 31, 2006

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 31, 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee v. JOSEPH O. SALADINO, individually doing business as Freedom and Privacy Committee, Defendant-Appellant	Case No. 05-55226 D.C. No. CV-04-02100-FMC Central District of California, Los Angeles ORDER

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges

Judge Kozinski has voted to deny the petition for rehearing en banc, and Judges Canby and Beezer so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The Petition for rehearing in banc is denied.

No further filings will be accepted in this closed appeal.

Not Signed

APPENDIX B

Miscellaneous Statutes and Regulations

1. **26 USC § 1402(b)**

   ..***An individual who is not a citizen of the United States*** but who is a resident of the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or American Samoa ***shall not, for the purposes of this chapter be considered to be a nonresident alien individual.***

2. **26 USC § 3121(e)**

   An individual who is ***a citizen of the Commonwealth of Puerto Rico*** (but not otherwise a citizen of the United States) ***shall be considered...as a citizen*** of the United States.

3. **26 USC § 3401(c)**

   (c) Employee
   For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

4. **26 USC § 61(a)**

   (a) General definition

   Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

   (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;

5. **26 USC § 7621**

Internal Revenue Districts

(a) Establishment and alteration

The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.

(b) Boundaries

For the purpose mentioned in subsection (a), the President may subdivide any State, or the District of Columbia, or may unite into one district two or more States.

6. **26 USC § 83(a)**

§ 83. Property transferred in connection with performance of services

(a) General rule

If, in connection with the performance of services *[labor],* ***property*** *[compensation]* ***is transferred*** *to* ***any person*** *[employee] other than the person for whom such services are performed [employer],* ***the excess of***—

(1) the fair market value of such property *[compensation] (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier,* ***over***

(2) ***the amount*** *(if any)* ***paid*** *[labor]* ***for such property*** *[compensation],* ***shall be included in the gross income of the person*** *[employee]* ***who performed such services*** *[labor] in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a*

substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture. (Emphasis added)

7. **4 USC § 72**

"All offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law."

8. **42 USC § 411(b)(2)**

The net earnings from self-employment, if such net earnings for the taxable year are less than $400. ***An individual who is not a citizen of the United States*** but who is a resident of the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or American Samoa ***shall not***, for the purpose of this subsection, ***be considered to be a nonresident alien individual.*** In the case of church employee income, the special rules of subsection (i)(2) of this section shall apply for purposes of paragraph (2).

9. **48 USC § 1612.**

Jurisdiction of District Court

(a) Jurisdiction

The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28 and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the an-

cillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which would constitute a criminal offense described in chapter 75 of subtitle F of title 26 shall constitute an offense against the government of the Virgin Islands and may be prosecuted in the name of the government of the Virgin Islands by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin Islands, notwithstanding the provisions of section 1617 of this title.

(b) General jurisdiction; limitations

In addition to the jurisdiction described in subsection (a) the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: Provided, That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations. The courts established by local law shall have jurisdiction over the civil actions, criminal cases, and violations set forth in the preceding proviso. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by local law for the purposes of determining the availability of indictment by grand jury or trial by jury.

(c) Criminal offenses; concurrent jurisdiction with local courts

The District Court of the Virgin Islands shall have concurrent jurisdiction with the courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section.

10. **26 CFR § 1.1-1(a)(1) and (c)**

(a) *General rule.* (1) Section 1 of the Code imposes an income tax on the income of every individual who is a citizen or resident of the United States and, to the extent provided by section 871(b) or 877

(c) *Who is a citizen.* Every person born or naturalized in the United States and subject to its jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1401–1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481–1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70–506, C.B. 1970–2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.

11. **26 CFR § 1.1001-1**

Computation of gain or loss.

(a) General rule. Except as otherwise provided in subtitle A of the Code, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property (other than money) received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. The general method of computing such gain or loss is prescribed by section 1001 (a) through (d) which contemplates that from the amount realized upon the sale or exchange there shall be withdrawn a sum sufficient to restore the adjusted basis prescribed by section 1011 and the regulations thereunder (i.e., the cost or other basis adjusted for receipts, expenditures, losses, allowances, and other items chargeable against and applicable to such cost or other basis). The amount which remains after the adjusted basis has been restored to the taxpayer constitutes the realized gain. If the amount realized upon the sale or exchange is insufficient to restore to the taxpayer the adjusted basis of the property, a loss is sustained to the extent of the difference between such adjusted basis and the amount realized. The basis may be different depending upon whether gain or loss is being computed. For example, see section 1015(a) and the regulations thereunder. Section 1001(e) and paragraph (f) of this section prescribe the method of computing gain or loss upon the sale or other disposition of a term interest in property the adjusted basis (or a portion) of which is determined pursuant, or by reference, to section 1014 (relating to the basis of property acquired from a decedent)

or section 1015 (relating to the basis of property acquired by gift or by a transfer in trust).

12. **26 CFR 1.1402(b)-1(d)**

Nonresident aliens.

A nonresident alien individual never has self-employment income. While ***a nonresident alien individual*** who derives income from a trade or business carried on within the United States, Puerto Rico, the Virgin Islands, Guam, or American Samoa... ***may be subject to the applicable income tax provisions*** on such income, such nonresident alien individual ***will not be subject to the tax on self-employment income***, since any net earnings which he may have...do not constitute self-employment income. ***For the purposes of the tax on self-employment income, an individual who is not a citizen of the United States but who is a resident of the Commonwealth of Puerto Rico, the Virgin Islands, or...of Guam or American Samoa is not considered to be a nonresident alien individual.***

13. **26 CFR 1.61-1(b).**

(b) *Cross references.* Cross references to other provisions of the Code are to be found throughout the regulations under section 61. The purpose of these cross references is to direct attention to the more common items which are included in or excluded from gross income entirely, or treated in some special manner. To the extent that another section of the Code or of the regulations thereunder, provides specific treatment for any item of income, such other provision shall apply notwithstanding section 61 and the regulations thereunder. The cross references do not cover all possible items.

14. **26 CFR § 1.83-3(e).**

(e) *Property.* For purposes of section 83 and the regulations thereunder, the term "property" includes real and personal property other than either money or an unfunded and unsecured promise to pay money or property in the future. The term also includes a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account. See, however, §1.83–8(a) with respect to employee trusts and annuity plans subject to section 402(b) and section 403(c). In the case of a transfer of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection, or any undivided interest therein, the policy cash value and all other rights under such contract (including any supplemental agreements thereto and whether or not guaranteed), other than current life insurance protection, are treated as property for purposes of this section. However, in the case of the transfer of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection, which was part of a split-dollar arrangement (as defined in §1.61–22(b)) entered into (as defined in §1.61–22(j)) on or before September 17, 2003, and which is not materially modified (as defined in §1.61–22(j)(2)) after September 17, 2003, only the cash surrender value of the contract is considered to be property. Where rights in a contract providing life insurance protection are substantially nonvested, see §1.83–1(a)(2) for rules relating to taxation of the cost of life insurance protection.

15. **26 CFR § 1.83-3(g)**

Meaning of certain terms:
(g) Amount paid. For purposes of section 83 and the regulations thereunder, the term "amount paid" refers to the value of any money or property paid for the

transfer of property to which section 83 applies, and does not refer to any amount paid for the right to use such property or to receive the income therefrom. Such value does not include any stated or unstated interest payments. For rules regarding the calculation of the amount of unstated interest payments, see §1.483–1(c). When section 83 applies to the transfer of property pursuant to the exercise of an option, the term "amount paid" refers to any amount paid for the grant of the option plus any amount paid as the exercise price of the option. For rules regarding the forgiveness of indebtedness treated as an amount paid, see §1.83–4(c).

16. **26 CFR 31.0-2(a)(1)**

The terms defined in the provisions of law contained in the regulations in this part shall have the meaning so assigned to them.

17. **26 CFR 31.3121(e)-1(b)**

The term "citizen of the United States" includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

APPENDIX C

Hughes v. United States, 953 F.2d 531, 535-36 (9th Cir. 1992) [Excerpt]

LEXSEE 953 F.2D 531,AT 535

Richard C. Hughes; Joan C. Hughes, Plaintiffs-Appellants, v. United States of America; Commissioner of Internal Revenue, Defendants-Appellees. Richard C. Hughes; Joan C. Hughes, Plaintiffs-Appellants, v. Commissioner of IRS; United States of America; Steven R. High; Lena High; United Savings Bank, Defendants-Appellees.

No. 90-56150, No. 91-55195

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

953 F.2d 531; 1992 U.S. App. LEXIS 103; 92-1 U.S. Tax Cas. (CCH) P50,086; 69 A.F.T.R.2d (RIA) 472; 34 Fed. R. Evid. Serv. (Callaghan) 1318; 92 Cal. Daily Op. Service 300; 92 Daily Journal DAR 396

December 2, 1991 *, Submitted, Pasadena, California

January 9, 1992, Filed

[HN25] *4 U.S.C.S. § 72* does not foreclose the exercise of authority by the Internal Revenue Service outside the District of Columbia. The President is authorized to establish internal revenue districts [26 USC § 7621] for the purpose of administering the internal revenue laws, and these districts can be created outside of Washington, D.C. (Emphasis added).

APPENDIX D

Miscellaneous cases cited in support of the IRC § 83(a) deduction.

1. ***Montelepre Systemed, Inc. v. C.I.R.*, 956 F.2d 496, 498 at [1] (CA5 1992)**

   "***Section 83(a) explains how property received in exchange for services is taxed.***"

2. ***MacNaughton v. C.I.R.*, 888 F.2d 418, 421 (CA6 1989)**

   "The *Alves* court stated that the plain language of section 83 belied this argument because the "***statute applied to all property transferred in connection with the performance of services***" and because no reference is made to the term "compensation." *Id.* The court further concluded in *Alves* that "if Congress had intended section 83(a) to apply solely to restricted stock used to compensate employees, it could have used much narrower language." *Id.* at 481-82. Upon consideration, ***we agree with the interpretation advanced by the Alves court and, therefore, join the Ninth Circuit in holding that section 83 is not limited to stock transfers*** which are compensatory in nature."

3. **Pledger v. C.I.R., 641 F.2d 287, 293 (CA5 1981)**

   "The taxing scheme imposed by Congress more ***accurately reflects what taxpayer received as compensation*** than a scheme that taxes the taxpayer on merely a portion of the compensation."

4. ***Alves v. C.I.R.*, 734 F.2d 478, 481 (CA9 1984)**

   "The plain language of section 83(a) belies *Alve's* argument. ***Section 83(a) applies to all property transferred in connection with the performance of services.*** No reference is made to the term "com-

pensation." Nor is there any statutory requirement that property have a fair market value in excess of the amount paid at the time of transfer. Indeed, ***if Congress had intended section 83(a) to apply solely to restricted stock used to compensate its employees, it could have used much narrower language***. Indeed, Congress made section 83(a) applicable to all restricted "property," not just stock; to property transferred to "any person," not just to employees; and ***to property transferred "in connection with... services," not just compensation for employment***. See *Cohn v. Commissioner*, 73 USTC 443, 446-47 (1979)."

5. **Klingler Electric Co. v. C.I.R., 776 F.Supp. 1158, 1164 at [1] (S.D.Miss. 1991)**

   "***Section 83(a) applies to all property transferred in connection with the performance of services***."

6. ***Robinson v. C.I.R.*, 82 USTC 444, 459 (1984)**

   The legislative history of section 83 does not require the conclusion that the statute should be applied to tax-avoidance techniques only. To the contrary, the House and Senate reports specifically delineate transactions and transfers to which section 83 was not to apply and ***do not exclude from its purview contractual provisions that were not tax motivated***."

7. ***Cohn v. C.I.R.*, 73 USTC 443, 446 (1979)**

   "Petitioners rest their entire case on the proposition that Elovich and Cohn and/or Mega were "independent contractors" and not employees of the Integrated and that, therefore, section 83 does not apply to the acquisition of the shares from Integrated. They rely on the legislative history surrounding the statute to support their proposition that section 83 was intended to apply only to restricted stock transferred to employees. ***Respondent contends that the words "any person" in section 83(a) encompass independent contractors as well as employees***. We agree with

Respondent...We reject petitioner's argument. While restricted stock plans involving employers and employees may have been the primary impetus behind the enactment of section 83, ***the language of the section covers the transfer of any property transferred in connection with the performance of services*** "to any person other than the person for whom the services are performed." (Emphasis added.) The legislative history makes clear that Congress was aware that the statute's ***coverage extended beyond restricted stock plans for employees***. H.Rept. 91-413 (Part 1) (1969), 1969-3 C.B. 200, 255; S.Rept. 91-552 (1969), 1969-3 C.B. 423, 501. The regulations state that that section 83 applies to employees and independent contractors (sec. 1.83-1(a), Income Tax Regs.). There is no question but that, under the foregoing circumstances, ***these regulations are not "unreasonably and plainly inconsistent with the revenue statutes." Consequently, they are sustained***. (cites omitted)"

APPENDIX E

Evidence related to IRS not being an Agency of the United States Government

1. **The Act of Congress, March 8, 1868**

   "...who shall be charged with such duties in the bureau of internal revenue as may be prescribed by the Secretary of the Treasury, or as may be required by law, and who shall act as Commissioner of internal revenue in the absence of that officer, and exercise the privilege of **FRANKING** all letters and documents pertaining to the office of internal revenue."

2. **Diversified Metal Products v. T-Dow Company Trust, Internal Revenue Service, and Steve Morgan; USDC District of Idaho, Case No. 93-405-E-EJL**

   Note: Filed on or about November 18 or 19, 1993. File stamp is difficult to read.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

DIVERSIFIED METAL PRODUCTS, Inc., Plaintiff	)	Case No. 93-405-E-EJL
v.	)	UNITED STATES' ANSWER AND CLAIM
T-DOW COMPANY TRUST, INTERNAL REVENUE SERVICE and STEVE MORGAN, Defendant	)	

The United States of America, through undersigned counsel hereby responds to the numbered paragraphs of plaintiff's complaint as follows:

...

4. Denies that the Internal Revenue Service is an agency of the United States Government...

...

Respectfully submitted this 18th day of November, 1993.

BETTY H. RICHARDSON
United States Attorney

s/ Richard R. Ward
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3. Index to 31 USC § 301 et. Seq.

Title 31, SUBCHAPTER I—ORGANIZATION

§ 301. Department of the Treasury

§ 302. Treasury of the United States
§ 303. Bureau of Engraving and Printing
§ 304. United States Mint
§ 305. Federal Financing Bank
§ 306. Fiscal Service
§ 307. Office of the Comptroller of the Currency
§ 308. United States Customs Service
§ 309. Office of Thrift Supervision
§ 310. Financial Crimes Enforcement Network
§ 311. Office of Intelligence and Analysis
§ 312. Continuing in office

4. **31 USC § 306. Fiscal Service**

(a) **The Fiscal Service is a service in the Department of the Treasury.**

(b) The head of the Fiscal Service is the Fiscal Assistant Secretary appointed under section 301 (d) of this title.

(c) The Fiscal Service has a—

(1) Bureau of Government Financial Operations, having as its head a Commissioner of Government Financial Operations; and

(2) Bureau of the Public Debt, having as its head a Commissioner of the Public Debt.

(d) The Secretary of the Treasury may designate another officer of the Department to act as the Fiscal Assistant Secretary when the Fiscal Assistant Secretary is absent or unable to serve or when the office of Fiscal Assistant Secretary is vacant.

5. **31 USC § 1301. Application**

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

(b) The reappropriation and diversion of the unexpended balance of an appropriation for a purpose other than that for which the appropriation originally was made shall be construed and accounted for as a new appropriation. The unexpended balance shall be reduced by the amount to be diverted.

(c) An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—

(1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or

(2) expressly provides that it is available after the fiscal year covered by the law in which it appears.

(d) A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.

NOTES:

Transfers From Appropriation Accounts; Salaries of Temporarily Reassigned Employees

Pub. L. 105–277, div. A, § 101(f) [title V, § 510], Oct. 21, 1998, 112 Stat. 2681–337, 2681–385, as amended by Pub. L. 106–31, title V, § 5005(l), May 21, 1999, 113 Stat. 111, provided that: "Notwithstanding any other provision of law, hereafter—

"(1) no amount may be transferred from an appropriation account for the Departments of Labor, Health and Human Services, and Education except as authorized in this or any subsequent appropriation Act, or in the Act establishing the program or activity for which funds are contained in this Act [see Tables for classification];

"(2) no department, agency, or other entity, other than the one responsible for administering the program or

activity for which an appropriation is made in this Act, may exercise authority for the timing of the obligation and expenditure of such appropriation, or for the purpose for which it is obligated and expended, except to the extent and in the manner otherwise provided in sections 1512 and 1513 of title 31, United States Code; and

"(3) no funds provided under this Act or subsequent Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Acts shall be available for the salary (or any part thereof) of an employee who is reassigned on a temporary detail basis to another position in the employing agency or department or in any other agency or department, unless the detail is independently approved by the head of the employing department or agency."

APPENDIX F

Talmage v. C.I.R., S.Ct. #97-5299 [Excerpt]

LEXSEE T.C. MEMO 1996-114

STEPHEN V. TALMAGE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 339-95.

UNITED STATES TAX COURT

T.C. Memo 1996-114; 1996 Tax Ct. Memo LEXIS 109; 71 T.C.M. (CCH) 2370

March 11, 1996, Filed

DISPOSITION: [*1] An appropriate order and decision will be entered for respondent.

...

Because the issues are purely legal, this case is ripe for summary judgment. Tax protester arguments like the claim that wages are not taxable income also suffice (as an alternative to dismissal, and in the absence of better argument) to justify summary judgment for respondent. Coleman v. Commissioner, 791 F.2d 68 (7th Cir. 1986) (wages not income), affg. an Order of this Court; Beard v. Commissioner, 82 T.C. 766, 772-774 (1984) (wages not income), affd. per curiam 793 F.2d 139 (6th Cir. 1986); Cornell v. Commissioner, T.C. Memo. 1983-370 (wages not income). Even if wages are, in effect, an exchange of equal value for value, they are nevertheless taxable income. Rowlee v. Commissioner, 80 T.C. 1111, 1121-1122 (1983); [*18] Rice v. Commissioner, T.C. Memo. 1982-129. And even if we apply section 1001 to determine petitioner's gain, his basis is defined under sections 1011 and 1012 as his cost, not fair market value. Since he paid nothing for his labor, his cost and thus his basis are zero. Rice v. Commissioner, supra. Consequently, even under section 1001, his taxable income from his labor is his total gain reduced by nothing, i.e., his wages.

Petitioner's primary argument n3 is that section 83, Property Transferred in Connection with Performance of Services, has the effect of exempting his wages from income tax because it requires us to apply section 1012, which specifies that cost should be used to determine the basis of property (unless the Code provides otherwise) to determine the extent to which wages constitute taxable income. Petitioner asserts that he "paid" for his wages with his labor and that section 83 allows the value of his labor as a cost to be offset against his wages, thereby exempting them from tax. Section 83 provides that property received for services is taxable to the recipient of the property to the extent of its [*19] fair market value minus the amount (if any) paid for the property. In attempting to equate his wages with property for which he has a tax cost, petitioner's argument is nothing more than a variation of the wages-are-not-income claim frequently advanced by tax protesters, and it is completely without merit. Gammon v. Commissioner, T.C. Memo. 1996-4; Santangelo v. Commissioner, T.C. Memo. 1995-468. Cf. Crow v. Commissioner, T.C. Memo. 1995-584. Petitioner's argument fails for the same reason that other protesters' arguments fail; the worker's cost for his services--and thus his basis--is zero, not their fair market value.

...

APPENDIX G

U.S. v. Monsanto, 491 U.S. 600, 607-611 and (syllabus) (1989) [Excerpts]

LEXSEE 491 U.S. 600,AT 609

UNITED STATES v. MONSANTO

No. 88-454

SUPREME COURT OF THE UNITED STATES

491 U.S. 600; 109 S. Ct. 2657; 105 L. Ed. 2d 512; 1989 U.S. LEXIS 3132; 57 U.S.L.W. 4826

March 21, 1989, Argued

June 22, 1989, Decided

...

"Section 853's ***language is plain and unambiguous. Congress could not have chosen stronger words to express its intent*** that forfeiture be mandatory than § 853(a)'s language that upon conviction a person "shall forfeit...***any property***" and that the sentencing court "shall order" a forfeiture. ***Likewise, the statute provides a broad definition of property which does not even hint at the idea that assets used for attorney's fees are not included***. Every Court of Appeals that has finally passed on this argument has agreed with this view. ***Neither the Act's legislative history nor legislators' post-enactment statements support respondent's argument that an exception should be created because the statute does not expressly include property to be used for attorney's fees, or because Congress simply did not consider the prospect that forfeiture*** [491 U.S. 601] ***would reach such property***...Moreover, ***respondent's admonition that courts should construe statutes to***

avoid decision as to their constitutionality is not license for the judiciary to rewrite statutory language. Pp. 606-611." [1]

"In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). ***In the case before us, the language of § 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees – or anything else, for that matter.***

As observed above, § 853(a) provides that a person convicted of the offenses charged in respondent's indictment "***shall forfeit . . . any property***" that was derived from the commission of these offenses. After setting out this rule, § 853(a) repeats later in its text that upon conviction a sentencing court "shall order" forfeiture of ***all property*** described in § 853(a). ***Congress could not have chosen stronger words to express its intent*** that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited. ***Likewise, the statute provides a broad definition of "property" when describing what types of assets are within the section's scope: "real property . . . tangible and intangible personal property, including rights, privileges, interests, claims, and securities."*** 21 U.S.C. § 853(b) (1982 ed., Supp.V). ***Nothing in this all-inclusive listing even hints at the idea that assets to be used to pay an attorney are not "property" within the statute's meaning.***

Nor are we alone in concluding that the statute is unambiguous in failing to exclude assets that could be used to pay an attorney from its definition of forfeitable property. This argument, advanced by respondent here, see Brief for Respon-

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[1] See *U.S. v. Monsanto*, 491 U.S. 600 (syllabus) (1989).

dent 12-19, ***has been unanimously rejected by every Court of Appeals that has finally passed on it,*** as it was by the Second Circuit panel below, see 836 F.2d at 78-80; id. at 85-86 (Oakes, J., dissenting); ***even the judges who concurred*** on statutory grounds in the en banc decision ***did not accept this position,*** see 852 F.2d at 1405-1410 (Winter, J., concurring). We note also that the Brief for American Bar Association as ***Amicus Curiae 6, frankly admits that the statute "on [its] face, broadly cover[s] all property derived from alleged criminal activity and contain[s] no specific exemption for property used to pay bona fide attorneys' fees."***

Respondent urges us, nonetheless, ***to interpret the statute to exclude such property for several reasons.*** Principally, ***respondent contends that we should create such an exemption because the statute does not expressly include property to be used for attorneys' fees*** . . . In support, respondent observes that the legislative history is "silent" on this question, and that the House and Senate debates fail to discuss this prospect. But this proves nothing[.] ***The fact that the forfeiture provision reaches assets that could be used to pay attorney's fees, even though it contains no express provisions to this effect, "'does not demonstrate ambiguity'" in the statute: "'It demonstrates breadth.'"*** *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (quoting *Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (CA7 1984)). ***The statutory provision at issue here is broad and unambiguous,*** and Congress' failure to supplement § 853(a)'s ***comprehensive phrase – "any property" – with an exclamatory "and we even mean assets to be used to pay an attorney" does not lessen the force of the statute's plain language."*** [2]

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[2] See *Monsanto, Id.*, at 607-09.

"As we have noted before, such post-enactment views "form a hazardous basis for inferring the intent" behind a statute, *United States v. Price*, 361 U.S. 304, 313 (1960); instead, Congress' intent is "***best determined by [looking to] the statutory language that it chooses***," *Sedima, S.P.R.L., supra*, at 495, n.13. . . . ***Finally, respondent urges us, see Brief for Respondent 2029, to invoke a variety of general canons of statutory construction***, as well as several prudential doctrines of this Court, to create the statutory exemption he advances; among these doctrines is our admonition that courts should construe statutes to avoid decision as to their constitutionality. See, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). ***We respect these canons, and they are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such "interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature."*** *United States v. Albertini*, 472 U.S. 675, 680 (1985). ***Here, the language is clear and the statute comprehensive: § 853 does not exempt assets to be used for attorney's fees from its forfeiture provisions.*** [3]

[3] See *Monsanto, Id.*, at 610-11.

APPENDIX H

Department of Housing and Urban Renewal v. Rucker, 535 U.S. 125, 130-31 (2002) [Excerpts]

LEXSEE 535 U.S. 125,AT 130

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER v. PEARLIE RUCKER ET AL., OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS v. PEARLIE RUCKER ET AL.

Nos. 00-1770 and 00-1781

SUPREME COURT OF THE UNITED STATES

535 U.S. 125; 122 S. Ct. 1230; 152 L. Ed. 2d 258; 2002 U.S. LEXIS 2144; 70 U.S.L.W. 4206

February 19, 2002, Argued

March 26, 2002, Decided *

...

"That this is so seems ***evident from the plain language of the statute.*** It provides that -

> each public housing authority shall utilize leases which . . . provide that . . . ***any*** drug-related criminal activity on or off such premises, engaged in by a public housing tenant, ***any*** member of the tenant's household, or ***any*** guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (1994 Ed., Supp.V). The en banc Court of Appeals thought the statute did not address "the level of personal knowledge or fault that is required for eviction." 237 F.3d at 1120. ***Yet Congress' decision not to impose any qualification in the statute, combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement.*** See *United States v. Monsanto*, 491 U.S. 600, 609 (1989). ***As we***

have explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Thus, ***any*** drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew or should have known about."

APPENDIX I

U.S. v. Gonzales, 520 U.S. 1, 4-6 (1997) [Excerpts]

LEXSEE 520 U.S. 1,AT 6

UNITED STATES, PETITIONER v. MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ AND MARIO PEREZ

No. 95-1605

SUPREME COURT OF THE UNITED STATES

520 U.S. 1; 117 S. Ct. 1032; 137 L. Ed. 2d 132; 1997 U.S. LEXIS 1489; 65 U.S.L.W. 4157; 97 Cal. Daily Op. Service 1545; 97 Daily Journal DAR 2243; 10 Fla. L. Weekly Fed. S 326

December 11, 1996, Argued

March 3, 1997, Decided

...

"Our analysis begins, as always, with the statutory text. Section 924(c)(1) provides:

> Whoever, during and in relation to any...drug trafficking crime...for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime..., be sentenced to imprisonment for five years... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment* including that imposed for the... drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c)(1) (emphasis added). The question we face is whether the phrase "any other term of imprisonment" "means what it says, or whether it should be limited to some subset" of prison sentences, *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) -- namely, only federal sentences. ***Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts.*** *Cf. United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (noting that statute referring to "any law enforcement officer" includes "federal, state, or local" officers); *Collector v. Hubbard*, 12 Wall. 1, 15 (1871) (***stating "it is quite clear" that a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense***"). There is no basis in the text for limiting § 924(c) to federal sentences.

In his dissenting opinion, JUSTICE STEVENS suggests that the word "any" as used in the first sentence of § 924(c) "unquestionably has the meaning 'any federal.'" *Post* at 14. In that first sentence, however, Congress *explicitly* limited the scope of the phrase "any crime of violence or drug trafficking crime" to those "for which [a defendant] may be prosecuted in a court of the United States." Given that Congress expressly limited the phrase "any crime" to only federal crimes, we find it significant that no similar restriction modifies the phrase "any other term of imprisonment," which appears only two sentences later and is at issue in this case. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("***Where Congress includes particular language in one section of a statute but omits it in***

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'").

The Court of Appeals also found ambiguity in Congress' decision, in drafting § 924(c), to prohibit concurrent sentences instead of simply mandating consecutive sentences. 65 F.3d at 820. Unlike the lower court, however, we see nothing remarkable (much less ambiguous) about Congress' choice of words. Because consecutive and concurrent sentences are exact opposites, Congress implicitly required one when it prohibited the other. This "ambiguity" is, in any event, beside the point, because this phraseology has no bearing on whether Congress meant § 924(c) sentences to run consecutively only to other federal terms of imprisonment.

Given the straightforward statutory command, there is no reason to resort to legislative history. *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992). Indeed, far from clarifying the statute, the legislative history only muddies the waters. The excerpt from the Senate Report accompanying the 1984 amendment to § 924(c), relied upon by the Court of Appeals, reads:

> [T]he Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense.

S.Rep. at 313-314. This snippet of legislative history injects into § 924(c) an entirely new idea -- that a defendant must serve the five-year-prison term for his firearms conviction before any other sentences. ***This added requirement, however, is "in no way anchored in the text of the statute."*** *Shannon v. United States,* 512 U.S. 573, 583 (1994).

APPENDIX J

United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994) [Excerpt]

LEXSEE 511 U.S. 350,AT 357

UNITED STATES, PETITIONER v. PEDRO ALVAREZ-SANCHEZ

No. 92-1812

SUPREME COURT OF THE UNITED STATES

511 U.S. 350; 114 S. Ct. 1599; 128 L. Ed. 2d 319; 1994 U.S. LEXIS 3300; 62 U.S.L.W. 4289; 94 Cal. Daily Op. Service 3059; 94 Daily Journal DAR 5866; 8 Fla. L. Weekly Fed. S 83

March 1, 1994, Argued

May 2, 1994, Decided

...

"Respondent contends that he was under "arrest or other detention" for purposes of § 3501(c) during the interview at the Sheriff's Department, and that his statement to the Secret Service agents constituted a confession governed by this subsection. ***In respondent's view, it is irrelevant that he was in the custody of the local authorities, rather than that of the federal agents, when he made the statement. Because the statute applies to persons in the custody of "any" law enforcement officer or law enforcement agency, respondent suggests that the § 3501(c) 6-hour time period begins to run whenever a person is arrested by local, state, or federal officers.***

We believe respondent errs in placing dispositive weight on the broad statutory reference to "any" law enforcement officer or agency without considering the rest of the statute."

APPENDIX K

Black's Law Dictionary, 6th Ed., "Expressly"

"In an express manner; in ***direct and unmistakable terms; explicitly; definitely; directly****. St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d. 685, 689.* ***The opposite of impliedly****. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d. 381, 396." (emphasis added)*

APPENDIX L

Murphy v. IRS

MARRITA MURPHY AND DANIEL J. LEVEILLE, APPELLANTS v. INTERNAL REVENUE SERVICE AND UNITED STATES OF AMERICA, APPELLEES

No. 05-5139

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2006 U.S. App. LEXIS 21401

February 24, 2006, Argued

August 22, 2006, Decided

...

C. The *Sixteenth Amendment*

The Government of the United States is a government of limited powers: "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).* The constitutional power of the Congress to tax income is provided in the *Sixteenth Amendment*, ratified in 1913:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The Supreme Court has held the word "incomes" in the Amendment and the phrase "gross income" in *§ 61(a) of the IRC* are coextensive. *See Helvering v. Clifford, 309 U.S. 331, 334, 60 S. Ct. 554, 84 L. Ed. 788, 1940-1 C.B. 105 (1940)* (*§ 61* represents the "full measure of [the Congress's] taxing power"). When it first construed those terms in *Eisner v. Macomber, 252 U.S. 189, 207, 40 S. Ct. 189, 64 L. Ed. 521, 1920-3 C.B. 25, T.D. 3010 (1920)*, the

Supreme Court held the taxing power extended to any "gain derived from capital, from labor, or from both combined." Later, after explaining that [*15] *Eisner* was not "meant to provide a touchstone to all future gross income questions," the Court added that under the IRC -- and, by implication, under the *Sixteenth Amendment* -- the Congress may "tax all gains" or "accessions to wealth." *Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430-31, 75 S. Ct. 473, 99 L. Ed. 483, 1955-1 C.B. 207 (1955).*

Murphy argues that, being neither a gain nor an accession to wealth, her award is not income and *§ 104(a)(2)* is therefore unconstitutional insofar as it would make the award taxable as income. Broad though the power granted in the *Sixteenth Amendment* is, the Supreme Court, as Murphy points out, has long recognized "the principle that a restoration of capital [i]s not income; hence it [falls] outside the definition of 'income' upon which the law impose[s] a tax." *O'Gilvie, 519 U.S. at 84; see, e.g., Doyle v. Mitchell Bros. Co., 247 U.S. 179, 187-88, 38 S. Ct. 467, 62 L. Ed. 1054, T.D. 2723 (1918); S. Pac. Co. v. Lowe, 247 U.S. 330, 335, 38 S. Ct. 540, 62 L. Ed. 1142, T.D. 2730 (1918)* (return of capital not income under IRC or *Sixteenth Amendment*). By analogy, Murphy contends a damage award for personal injuries --including nonphysical injuries [*16] --is not income but simply a return of capital -- "human capital," as it were. *See* Gary S. Becker, *Human Capital* (1st ed. 1964); Gary S. Becker, "The Economic Way of Looking at Life," 43-45 (Nobel Lecture, Dec. 9, 1992).

According to Murphy, the Supreme Court read the concept of "human capital" into the IRC in *Glenshaw Glass.* There, in holding that punitive damages for personal injury were "gross income" under the predecessor to *§ 61*, the Court stated:

> The long history of ... holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot

> support exemption of punitive damages following injury to property ... Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

348 U.S. at 432 n.8. In Murphy's view, the Court thereby made clear that the recovery of compensatory damages for a "personal injury" --of whatever type --is analogous to a "return of capital" and therefore is not income under the IRC or the *Sixteenth Amendment.*

In support of her reading of the caselaw, Murphy contends [*17] the IRC, as drafted shortly after "passage of the [Sixteenth] Amendment demonstrates that compensatory damages designed to make a person whole are excluded from the definition of 'income.'" She focuses upon the three sources the Supreme Court quoted in *O'Gilvie, 519 U.S. 84-87, 136 L. Ed. 2d 454,* to wit, an Opinion of the Attorney General, a Decision of the Department of the Treasury, and a Report issued by the Ways and Means Committee of the House of Representatives --each of which predates the first version of *§ 104(a)(2),* namely, *§ 213(b)(6)* of the Revenue Act of 1918. *See* 40 Stat. 1057, 1066 (1919).

In an opinion rendered to the Secretary of the Treasury on the question whether proceeds from an accident insurance policy were income under the IRC as it stood prior to the 1918 Act, the Attorney General stated:

> Without affirming that the human body is in a technical sense the "capital" invested in an accident policy, in a broad, natural sense the proceeds of the policy do but substitute, so far as they go, capital which is the source of future periodical income. They merely take the place of capital in human ability which was destroyed by the accident. [*18] They are therefore "capital" as distinguished from "income" receipts.

31 Op. Att'y. Gen. 304, 308 (1918). In a revenue ruling, the Department of the Treasury then reasoned that

> upon similar principles ... an amount received by an individual as the result of a suit or compromise for personal injuries sustained ... through accident is not income[that is] taxable.

T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918).

As for the House Report on the bill that became the Revenue Act of 1918, it states:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income.

H.R. Rep. No. 65-767, at 9-10 (1918). Thereafter, the Congress passed the Act, *§ 213(b)(6)* of which excluded from gross income "[a]mounts received, through accident or health insurance or under workman's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement [*19] on account of such injuries or sickness." 40 Stat. 1057, 1066 (1919).

Because the 1918 Act followed soon after ratification of the *Sixteenth Amendment*, Murphy contends that the statute reflects the meaning of the Amendment as it would have been understood by those who framed, adopted, and ratified it. She observes that in *Dotson v. United States, 87 F.3d 682 (5th Cir. 1996)*, the court concluded upon the basis of the House Report that the "Congress first enacted the personal injury compensation exclusion ... when such payments were considered the return of human capital, and thus not constitutionally taxable 'income' under the *16th amendment*." *Id. at 685.*

The Government attacks Murphy's constitutional argument on all fronts. First, invoking the presumption that the Congress enacts laws within its constitutional limits, *see Rust v. Sullivan, 500 U.S. 173, 191, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*, the Government asserts at the outset that *§ 104(a)(2)* is constitutional even if, as amended in 1996, it does permit the taxation of compensatory damages. Indeed, the Government goes further, contending the Congress could, consistent with the *Sixteenth* [*20] *Amendment*, repeal *§ 104(a)(2)* altogether and tax compensation even for physical injuries.

Noting that the power of the Congress to tax income "extends broadly to all economic gains," *Comm'r v. Banks, 543 U.S. 426, 433, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005)*, the Government next maintains that compensatory damages "plainly constitute economic gain, for the taxpayer unquestionably has more money after receiving the damages than she had prior to receipt of the award." On that basis, the Government contends Murphy's reliance upon footnote eight of *Glenshaw Glass* is misplaced; merely because the Congress "has historically excluded personal injury recoveries from gross income, based on the make-whole or restoration-of-human-capital theory, does not mean that such an exclusion is mandated by the *Sixteenth Amendment*." Because the Supreme Court in *Glenshaw Glass* was construing "gross income" with reference only to the IRC, the Government argues footnote eight addresses only a now abandoned congressional policy, not the outer limit of the *Sixteenth Amendment*.

According to the Government, the same is true of the 1918 Act and the interpretive rulings that preceded it. Although the Government [*21] acknowledges that the dictum in *Dotson, 87 F.3d at 685*, accords with Murphy's position, the Government notes the court there relied solely upon the House Report. Because the House Report merely states "it is doubtful whether ... compensation for personal injury or sickness ... [is] required to be included in gross income," H.R. Rep. No. 65-767, at 9-10 (1918), the

Government observes that the "report simply does not establish that Congress believed taxing compensatory personal injury damages would be unconstitutional."

In addition, the Government challenges the coherence of Murphy's analogy between a return of "human capital or well-being" and a return of "financial capital," the latter of which it acknowledges does not constitute income under the *Sixteenth Amendment*. *See Doyle, 247 U.S. at 187*; *S. Pac. Co., 247 U.S. at 335*. The Government first observes that financial capital, like all property, has a "basis," defined by the IRC as "the cost of such property," *26 U.S.C. § 1012*, adjusted "for expenditures, receipts, losses, or other items, properly chargeable to [a] capital account," *id. § 1016(a)(1)*; [*22] thus, when a taxpayer sells property, his income is "the excess of the amount realized therefrom over the adjusted basis." *Id. § 1001(a)*. The Government then observes that "[b]ecause people do not pay cash or its equivalent to acquire their well-being, they have no basis in it for purposes of measuring a gain (or loss) upon the realization of compensatory damages." Nor is there any corresponding theory of "human depreciation," which would permit "an offsetting deduction for the exhaustion of the taxpayer's physical prowess and mental agility." Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* P 5.6 (2003). Finally, the Government points to the Ninth Circuit's dictum in *Roemer v. Commissioner, 716 F.2d 693 (1983)*, suggesting that "[s]ince there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth." *Id. at 696 n.2*.

At the outset, we reject the Government's breathtakingly expansive claim of congressional power under the *Sixteenth Amendment* --upon which it founds the more far-reaching [*23] arguments it advances here. The *Sixteenth Amendment* simply does not authorize the Congress to tax as "incomes" every sort of revenue a taxpayer may receive. As the Supreme Court noted long ago, the

"Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114, 46 S. Ct. 48, 70 L. Ed. 183, 1926-1 C.B. 147, T.D. 3790 (1925).* Indeed, because the "the power to tax involves the power to destroy," *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819),* it would not be consistent with our constitutional government, and the sanctity of property in our system, merely to rely upon the legislature to decide what constitutes income.

Fortunately, we need not rely solely upon the wisdom and beneficence of the Congress for, when the *Sixteenth Amendment* was drafted, the word "incomes" had well understood limits. To be sure, the Supreme Court has broadly construed the phrase "gross income" in the IRC and, by implication, the word "incomes" in the *Sixteenth Amendment,* but it also has made plain that the power to tax income extends only to "gain[s]" or "accessions to wealth." *Glenshaw Glass, 348 U.S. at 430-31.* That is [*24] why, as noted above, the Supreme Court has held a "return of capital" is not income. *Doyle, 247 U.S. at 187; S. Pac. Co., 247 U.S. at 335.* The question in this case is not, however, about a return of capital -- except insofar as Murphy analogizes human capital to physical or financial capital; the question is whether the compensation she received for her injuries is income. *

* In any event, the Government's quarrel with Murphy's analogy, based upon *Glenshaw Glass,* of "human capital" to financial or physical capital is not persuasive. To be sure, the analogy is incomplete; personal injuries do not entail an adjustment to any basis, nor are human resources, such as reputation, depreciable for tax purposes. But nothing in Murphy's argument implies a need to account for the basis in or to depreciate anything. Her point, rather, is that as with compensation for a harm to one's financial or physical capital, the payment of compensation for the diminution of a personal attribute, such as reputation, is but a restoration of the status quo ante, analogous to a

"restoration of capital," *Glenshaw Glass, 348 U.S. at 432 n.8*; in neither context does the payment result in a "gain" or "accession[] to wealth," *id. at 430-31.*

[*25]

To determine whether Murphy's compensation is income under the *Sixteenth Amendment*, we are instructed by the Supreme Court first to consider whether the taxpayer's award of compensatory damages is "a substitute for [a] normally untaxed personal ... quality, good, or 'asset.'" *O'Gilvie, 519 U.S. at 86.* Accordingly, we join our sister circuits by asking: "In lieu of what were the damages awarded"? *Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir. 1944); see Francisco v. United States, 267 F.3d 303, 319 (3d Cir. 2001)* (treating *Raytheon's* "in lieu of" test as authoritative); *Tribune Publ'g Co. v. United States, 836 F.2d 1176, 1178 (9th Cir. 1988)* (applying "in lieu of" test to determine whether settlement proceeds were income); *Gilbertz v. United States, 808 F.2d 1374, 1378 (10th Cir. 1987)* (adopting "in lieu of" test to determine whether compensatory damages were income). Here, if the $ 70,000 Murphy received was "in lieu of" something "normally untaxed," *O'Gilvie, 519 U.S. at 86*, then her compensation is not income under the *Sixteenth Amendment*; it is [*26] neither a "gain" nor an "accession[] to wealth." *Glenshaw Glass, 348 U.S. at 430-31.*

As we have seen, it is clear from the record that the damages were awarded to make Murphy emotionally and reputationally "whole" and not to compensate her for lost wages or taxable earnings of any kind. The emotional well-being and good reputation she enjoyed before they were diminished by her former employer were not taxable as income. Under this analysis, therefore, the compensation she received in lieu of what she lost cannot be considered income and, hence, it would appear the *Sixteenth Amendment* does not empower the Congress to tax her award.

Our conclusion at this point is tentative because the Supreme Court has also instructed that, in defining "incomes," we should rely upon "the commonly understood meaning of the term which must have been in the minds of the people when they adopted the *Sixteenth Amendment*." *Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519, 41 S. Ct. 386, 65 L. Ed. 751, T.D. 3173 (1921)*. And, to discern the original understanding of a provision of the Constitution, we must examine any contemporaneous implementing legislation. *See Myers v. United States, 272 U.S. 52, 175, 47 S. Ct. 21, 71 L. Ed. 160 (1926)* [*27] ("This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution ..., acquiesced in for a long term of years, fixes the construction to be given its provisions"); *see Macomber, 252 U.S. at 202* (district judge correctly treated "construction of the [Revenue Act of 1913] as inseparable from the interpretation of the *Sixteenth Amendment*"). Therefore, we must inquire whether "the people when they adopted the *Sixteenth Amendment*," or the Congress when it implemented the Amendment, would have understood compensatory damages for a nonphysical injury to be "income."

In the years immediately following ratification of the *Sixteenth Amendment*, the Congress created and then thrice revised the IRC. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913); Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916); Revenue Act of 1917, ch. 63, 40 Stat. 300 (1917); Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919). Of the four enactments, that of 1918 was the first to address the tax treatment of compensatory damages for personal injuries, and it did so without distinguishing between physical and nonphysical injuries. We agree with the [*28] Government that the House Report on the 1918 Act is ambiguous and therefore unhelpful on the question before us. We concur in Murphy's view, however, that the Attorney General's 1918 opinion and the Treasury Department's ruling of the same year strongly suggest that

the term "incomes" as used in the *Sixteenth Amendment* does not extend to monies received solely in compensation for a personal injury and unrelated to lost wages or earnings.

That emotional distress and loss of reputation were both actionable in tort when the *Sixteenth Amendment* was adopted supports the view that compensation for these nonphysical injuries was not regarded differently than was compensation for physical injuries and, therefore, was not considered income by the framers of the Amendment and the state legislatures that ratified it. By 1913, in at least 39 of the then-48 states and in the District of Columbia, the law made compensatory damages for "mental suffering" recoverable in the same matter as compensatory damages for physical harms; indeed, in 34 of those states, there are reported cases involving defamation and * other reputational injuries -- the very sort of injury Murphy suffered --and at least five [*29] more states allowed an action for alienation of affections, also a * nonphysical injury. As a result, we see no meaningful distinction between Murphy's award and the kinds of damages recoverable for personal injury when the *Sixteenth Amendment* was adopted. Because, as we have seen, the term "incomes," as understood in 1913, clearly did not include damages received in compensation for a physical personal injury, we infer that it likewise did not include damages received for a nonphysical injury and unrelated to lost wages or earning capacity.

* *See, e.g., Garrison v. Sun Printing & Publ'g Ass'n, 207 N.Y. 1, 6, 100 N.E. 430, 431, 3 Bradb. 267, 1 N.Y. L. Cas. 131 (1912)* (plaintiffs are "entitled to recover compensatory damages for mental distress resulting from the publication of defamatory words actionable in themselves"); *Guisti v. Galveston Tribune, 105 Tex. 497, 504-05 150 S.W. 874, 877 (1912)* (holding statute afforded "right to maintain an action for a publication not libelous per se [without having] to allege or prove special damages ... for mental anguish"); *Fileds v.*

Bynum, [illegible] *N.C. 413, 72 S.E. 449, 451 (1911)* (general damages in defamation actions "include injury to the feelings, and mental suffering endured in consequence"); *Comer v. Advertiser Co., 172 Ala. 613, 55 So. 195, 198 (1911)* (in libel actions "damages for mental pain and suffering ... must in all cases be fixed by the jury, in view of all the facts and circumstances surrounding any particular case"); *Miller v. Dorsey, 149 Mo. App. 24, 129 S.W. 66, 69 (1910)* (upholding jury award of damages in action for slander "to compensate [plaintiff] for the mortification and shame he might have suffered, and the disgrace and dishonor attempted to be cast upon him, and all damages done to his reputation"); *Jozsa v. Moroney, 125 La. 813, 821, 51 So. 908, 911 (1910)* (in libel action "damages for mental suffering alone can be recovered, although the party may have suffered no other loss"); *Moore v. Maxey, 152 Ill. App. 647, 1910 WL 1686, at *2 (1910)* ("Where words spoken are actionable *per se* ... there need be no direct evidence of mental suffering to enable the jury to consider it in their estimate of damages"); *Davis v. Mohn, 145 Iowa 417, 124 N.W. 206, 207 (1910)* (holding mental "pain and suffering may be considered by the jury in determining the amount of damages in cases where the words spoken are actionable [as slander] per se"); *Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97, 102 (1909)* (noting that "mental suffering alone [will] sustain a right of action" if "the words spoken or pictures published are of such a nature that the court can conclude, as a matter of law, that they will tend to degrade the person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided"); *Neafie v. Hoboken Printing & Publ'g Co., 75 N.J.L. 564, 566, 68 A. 146, 147 (1907)* (rejecting view that "mental anguish cannot be considered in estimating compensatory damages in an action of libel"); *McArthur v. Sault News Printing Co., 148 Mich. 556, 558, 112 N.W. 126, 127 (1907)* ("A woman might have a bad reputation and a bad character, neither of which

would be changed by such a [libelous] publication, and yet be entitled to substantial damages for injuries to her feelings resulting from the publication"); *Todd v. Every Evening Printing Co., 22 Del. 233, 6 Penne. 233, 66 A. 97, 99 (1907)* ("amount to be awarded to the plaintiff should be such as would reasonably compensate him for any wrong done to his reputation, good name, or fame, and for any mental suffering caused thereby as shown by the evidence"); *Gendron v. St. Pierre, 73 N.H. 419, 62 A. 966, 969 (1905)* ("amount of the damages" in slander action "depends in part upon the effect of the malice upon the plaintiff's mind"); *Ott v. Press Pub. Co., 40 Wash. 308, 310, 82 P. 403, 404 (1905)* ("upon a proper showing damages for mental pain and suffering may be recovered" in libel action); *Wash. Times Co. v. Downey, 26 App. D.C. 258, 1905 WL 17653, at *4 (1905)* (holding "plaintiff is ... entitled to recover as general damages for injury to her feelings and the mental suffering which she endured as a natural result of the [libelous] publication"); *Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 1042 (1904)* (noting that general damages for libel and slander actions are "designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation"); *Finger v. Pollack, 188 Mass. 208, 209, 74 N.E. 317, 318 (1905)* ("In an action for slander one of the elements of damage is mental suffering"); *Davis v. Starrett, 97 Me. 568, 55 A. 516, 519 (1903)* ("plaintiff is entitled to recover compensation [for] slander, such as injury to the feelings and injury to the reputation"); *Bedtkey v. Bedtkey, 15 S.D. 310, 89 N.W. 479, 480 (1902)* (holding "evidence of injury to feelings having been admitted without objection, damages therefore are recoverable"); *Kidder v. Bacon, 74 Vt. 263, 52 A. 322, 324 (1902)* ("It is well settled that when the words spoken are actionable the jury have a right to consider the mental suffering which may have been occasioned to a party by the publication of the slanderous words,

and to allow damages therefor"); *Hacker v. Heiney, 111 Wis. 313, 87 N.W. 249, 251 (1901)* (rejecting contention that "no recovery can be had for injury to feelings" in action for slander); *McCarty v. Kinsey, 154 Ind. 447, 57 N.E. 108, 108 (1900)* (holding it was "proper for the jury to consider" slanderous words used in course of an assault and battery "with all the circumstances in evidence, and the humiliation, degradation, shame, and loss of honor, and mental anguish, if any, caused thereby, in determining the amount of damages"); *Gray v. Times Newspaper Co., 78 Minn. 323, 324, 81 N.W. 7, 7 (1899)* (plaintiff "was entitled to some damages for injury to his feelings, shame, and loss of the good opinion of his fellows, and injury to his standing in the community"); *Louisville Press Co. v. Tennelly, 105 Ky. 365, 49 S.W. 15, 17, 20 Ky. L. Rptr. 1231 (1899)* ("the rule is well settled that the publication of a libel exposes the publisher, not only to compensatory damages for the loss of business, but also to a judgment for the mental suffering that the libel or slander inflicts upon the plaintiff"); *Cole v. Atlanta & W.P.R. Co., 102 Ga. 474, 31 S.E. 107, 108 (1897)* (permitting action by plaintiff passenger against railroad for its employee's slander, which caused plaintiff "to undergo the pain and mortification of being publicly denounced"); *Fry v. McCord, 95 Tenn. 678, 33 S.W. 568, 571 (1895)* (damages for slander per se may include "pain, mental anxiety, or general loss of reputation"); *Taylor v. Hearst, 170 Cal. 262, 270, 40 P. 392, 393-94 (1895)* ("actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail"); *Taylor v. Dominick, 36 S.C. 368, 15 S.E. 591, 593-94 (1892)* ("the elements of damages in the action for malicious prosecution are the injury to the reputation or character, feelings, health, mind, and person, as well as expenses incurred in defending the prosecution"); *Stallings v. Whittaker, 55 Ark. 494, 18*

S.W. 829, 831 (1892) (damages in slander action may compensate for "mental suffering and mortification"); *Republican Pub. Co. v. Mosman, 15 Colo. 399, 410, 24 P. 1051, 1055 (1890)* ("in cases of written slander where the defamatory matter is libelous *per se*, the mental suffering of the plaintiff, occasioned by the false publication, may be taken into consideration, in awarding general compensatory damages"); *Commercial Gazette Co. v. Grooms, 10 Ohio Dec. Reprint 489, 1889 WL 346, at *4 (1889)* ("The most natural result from an injury to reputation is mental suffering and it is a proper element to be considered in estimating damages in a libel suit"); *Boldt v. Budwig, 19 Neb. 739, 28 N.W. 280, 283 (1886)* ("jury should consider the damage to her character, as well as her mental suffering caused [by the slander]"); *Riddle v. McGinnis, 22 W.Va. 253, 1883 WL 3242, at *15 (1883)* ("in ... actions for wilful and wanton injuries done to the person and reputation ... the plaintiff is entitled to recover damages ... for his mental anguish"); *Swift v. Dickerman, 31 Conn. 285, 1863 WL 763, at *7 (1863)* (holding "anxiety and suffering [due to slander] were proper subjects for compensation to the plaintiff, and ought to be atoned for by the defendant"); *Beehler v. Steever*, 1 Miles 146, 1837 WL 3209, at *6 (1837) (noting in syllabus that "[o]utrage to the plaintiff's feelings and peace of mind may be considered" by the jury in awarding damages for slander).

[*30]

* *See, e.g., Greuneich v. Greuneich, 23 N.D. 368, 137 N.W. 415 (N.D. 1912); Hillers v. Taylor, 116 Md. 165, 81 A. 286 (Md. 1911); Seed v. Jennings, 47 Or. 464, 83 P. 872 (Or. 1905); Tucker v. Tucker, 74 Miss. 93, 19 So. 955 (Miss. 1896); Samuel v. Marshall, 30 Va. 567, 1832 WL 1822 (Va. 1832).* An action for "alienation of affection" enabled the plaintiff to recover damages for mental suffering and reputational damage arising from the defendant's interference in the relationship between the plaintiff and his or her spouse. *See gener-*

ally RESTATEMENT (SECOND) OF TORTS § 683 cmt. f (1977) ("It is unnecessary for recovery that the acts of the defendant cause any financial loss to the injured spouse").

The IRS itself reached the same conclusion when it first addressed the question, expressly affirming that personal injuries included nonphysical personal injuries:

> [T]here is no gain, and therefore no income, derived from the receipt of damages for alienation of [*31] affections or defamation of personal character ... If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market values, and thereafter receives either damages or payment in compromise for an invasion of that right, it can not be held that he thereby derives any gain or profit.

Sol. Op. 132, I-1 C.B. 82, 93 (1922); *see also Hawkins v. Commissioner, 6 B.T.A. 1023, 1024-25* (U.S. Bd. of Tax App. 1927) (holding "compensation for injury to [plaintiff's] personal reputation for integrity and fair dealing" was not income because it was "an attempt to make the plaintiff whole as before the injury"). Note that the Service regarded such compensation not merely as excludable under the IRC, but more fundamentally as not being income at all.

In sum, every indication is that damages received solely in compensation for a personal injury are not income within the meaning of that term in the *Sixteenth Amendment*. First, as compensation for the loss of a personal attribute, such as well-being or a good reputation, the damages are not received in lieu of income. Second, the framers of the *Sixteenth Amendment* [*32] would not have understood compensation for a personal injury -- including a nonphysical injury -- to be income. Therefore, we hold *§ 104(a)(2)* unconstitutional insofar as it permits

the taxation of an award of damages for mental distress and loss of reputation.

III. Conclusion

Albert Einstein may have been correct that "[t]he hardest thing in the world to understand is the income tax," *The Macmillan Book of Business and Economic Quotations* 195 (Michael Jackman ed., 1984), but it is not hard to understand that not all receipts of money are income. Murphy's compensatory award in particular was not received "in lieu of" something normally taxed as income; nor is it within the meaning of the term "incomes" as used in the *Sixteenth Amendment*. Therefore, insofar as *§ 104(a)(2)* permits the taxation of compensation for a personal injury, which compensation is unrelated to lost wages or earnings, that provision is unconstitutional. Accordingly, we remand this case to the district court to enter an order and judgment instructing the Government to refund the taxes Murphy paid on her award plus applicable [*33] interest.

APPENDIX M

16th Amendment to the Constitution

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.